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CHARLES ELMORE OROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 576

**AUBREY HICKENBOTTOM, CLARENCE N.
HUDSON, EARL E. BONSTEEL, F. L.
COFFMAN and HERBERT L. GIPSON**

Petitioners

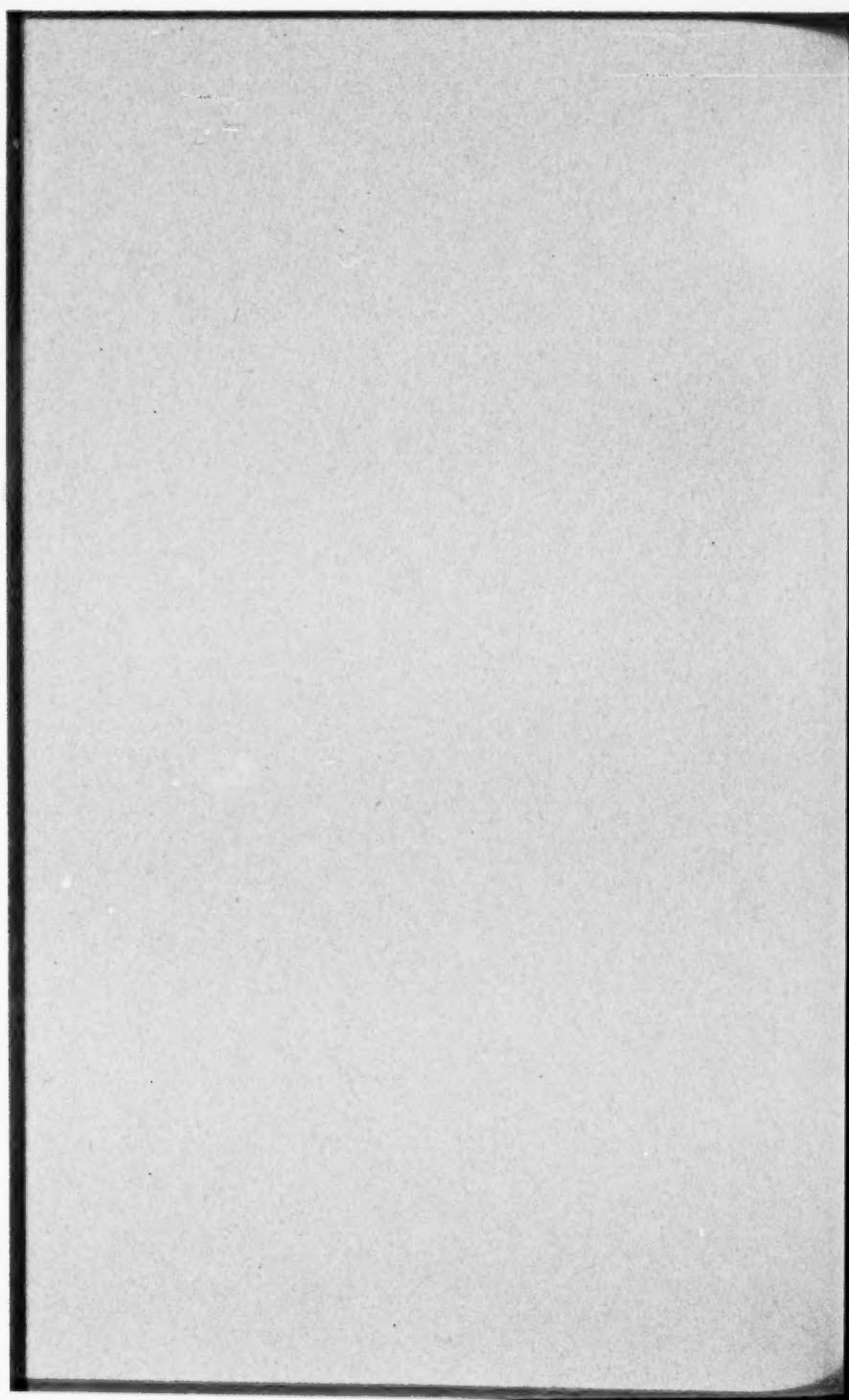
vs.

**W. J. McCAIN, ROLAND M. SHELTON, ROSS
RICHESEN, Sheriff of Boone County, Arkansas;
EULAN MOORE, Clerk of the Circuit Court of Boone
County, Arkansas and HUGH BURLISON,**

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF ARKANSAS
PETITION AND BRIEF IN SUPPORT THEREOF**

**CHARLES M. HAFT,
Attorney for Petitioners.**



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TO THE HONORABLE JUDGES
OF SAID COURT:

Aubrey Hickenbottom, Clarence N. Hudson, Earl E. Bonsteel, F. L. Coffman and Herbert L. Gipson petitioners, respectfully represent and show unto the court,

1. That they heretofore filed in the Chancery Court of Boone County, Arkansas a complaint on behalf of themselves and all others similarly situated to enjoin the collection of a tax to produce a fund out of which to pay benefits to employees, who are out of employment (R 1)

2. That the alleged tax is predicated upon two acts of the Arkansas Legislature.

3. That each of said acts is unconstitutional and void because each of them violates the XIV amendment to the constitution of the United States and various constitutional provisions of the constitution of the State of Arkansas and the opinion and judgment of the Supreme Court of Arkansas are evasive and in violation of the XIV amendment to Federal Constitution.

That by reason of said Federal Constitution being involved herein this court has jurisdiction of this proceeding.

4. That the trial court sustained a motion to strike and dismissed the complaint (R 13) and the Supreme Court of Arkansas sustained said action of the trial court. (R 24).

5. That owing to the Federal guaranty to the citizens of each state of a constitutional form of government and it appearing that the legislation here involved is unconstitutional and void there remains no law pursuant to which petitioners property sought to be taken as the taxes in question may be collected and hence there is no due process of law or equal protection of the law as is guaranteed to petitioners by the XIV amendment, to the Federal Constitution.

6. That prior to 1937 there existed in Arkansas, by statute a ministerial body termed the Bureau of Labor.

7. That in 1937 the legislature passed an act abolishing said Bureau and attempting to create a department to exercise certain powers of government of the state and named said department, "a Department of Labor"

in the state of Arkansas. (Section 2, Chapter 97 Popes Digest).

8. That in so far as it attempts to create a Department of Labor, said act was and is unconstitutional and void by reason of articles IV, V, VI, and VII of the Arkansas Constitution, as will more fully appear from a brief filed herein in support hereof.

9. That Section 1 of Article IV provides that all powers of government shall be divided into three departments to be known as Legislative, Executive, and Judicial.

10. That nowhere in said Constitution is a Department of Labor created or permitted.

11. That Section 1 of Article V vests all legislative powers in "a General Assembly."

12. That Section 1 of Article VI provides that the Executive Department of the State shall consist of a Governor, Secretary of State, Treasurer of State, Auditor of State, and Attorney General but authorizes the General Assembly to provide for the office of Commissioner of State Lands.

13. Article VII provides how the judicial power shall be vested in certain named courts and in certain others which the General Assembly is authorized to create.

14. That the defendant, Shelton, claims to be Director of the Employment Security Division in the Department of Labor by virtue of Section 10 of the Arkansas Employment Security Act and by virtue of his appointment by the Commissioner of Labor; that there is no such office or position as Commissioner of Labor; that the defendant, Shelton, does not hold the office of Director because there is no valid law creating such office, or providing for his appointment to said office.

15. That Section 10 of the Arkansas Security Employment Act which purports to grant power to the Commissioner of Labor to appoint a Director and fix his compensation is in violation of Section 4 of Article XVI of the State Constitution which makes it the exclusive right and duty of the Legislature to fix the salary of all State officers in the State.

16. That Ross Richesin is the Sheriff of Boone County.

17. That Hugh Burlison claims to be an employee under the Arkansas Employment Security Law, as Collector.

18. That said Labor Department act being unconstitutional and void, it does not constitute due process of law and is therefore in violation of the XIV amendment to the Federal Constitution, and it denies to petitioners the equal protection of the law, in violation of said XIV Amendment.

19. That petitioners are aware of the decisions of this court, bow thereto and do not question the authority of the General Assembly of the state of Arkansas to pass a law imposing a tax to create a fund out of which to pay benefits to employees who are out of employment.

20. That section 10 of said Act 391 of 1941 reads as follows:

"Section 10. There is hereby created in the Department of Labor a division to be known as the Employment Security Division, which shall be administered by a full-time salaried director, who shall be subject to the supervision and direction of the Commissioner. The Commissioner shall appoint, fix the compensation of and prescribe the duties of the director of the Employment Security Division, provided such appointment shall be made in accordance with the provisions of Section 11 (d) of this act."

21. That in as much as said Act 391 has no existence separate and apart from "the Department of Labor" and in as much as the act creating the Department of Labor is unconstitutional and void, there is no Department of Labor in which the Employment Security Division can exist. It has no other and separate existence and consequently does not exist at all.

22. That in as much as there can be no Director of a Division which does not exist the respondent Shelton is not a Director, nor is he a Director for the further reason that he can only be such by the appointment by a Commissioner of Labor who likewise does not exist.

23. That if the acts required by Act 391 to be done by the Commissioner of Labor are to be left undone for

want of a Commissioner to do them, it leaves the act incomplete, uncertain, meaningless, ambiguous, indefinite and void; that such an act does not constitute due process under the XIV amendment to the Federal Constitution and is consequently unconstitutional and void.

24. That section 5 of Article XVI of the constitution of Arkansas exempts from taxation, "Public property used exclusively for public purposes; churches used as such, cemeteries used exclusively as such, school buildings and apparatus; libraries and grounds used exclusively for school purposes, buildings and grounds and materials used exclusively for public charity." Section 6 of Article XVI of the Arkansas Constitution provides:

All laws exempting property from taxation other, than as provided in this constitution shall be void." Section 2 (6) of Act 391 attempts to exempt from taxation:

(A) Domestic service in a private home.

(B) Services performed on a farm.

(D) Services performed by an individual by his son, daughter, or spouse or by a child under the age of 21.

(H) Services performed by one in the employ of an organization exempt from the payment of income tax, under certain conditions.

(H) (2) Such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order or association.

(L) Services performed in the employ of Chambers of Commerce, base-ball clubs and civic organizations and labor unions, except those liable for tax under the Federal Unemployment Tax Act.

(M) Services performed by a student nurse or interne.

(N) Services by one delivering newspapers where the compensation is the difference between wholesale and retail prices.

(O) Services by one now or hereafter exempt under federal law.

(P) Services performed by an insurance agent working on commission.

That by reason of the exempting provisions of said section 2 (6) said act 391 is rendered entirely void.

25. That even if Act 391 were an independent act and not a branch grafted onto the Labor Department trunk, without which it has no existence, still said act is so dependent upon the Commissioner of Labor for the performance of so many acts, which if left unperformed would render the act so incomplete, indefinite ambiguous and uncertain as to render it void and not due process of law as is required by the XIV amendment to the Federal Constitution. That instances of powers and duties involving the Commissioner of Labor are,

Section 2. (i) (3) (B) Covers an arrangement pursuant to Section 18 of the Act and "the agency charged with the administration of any other State or Federal Unemployment Compensation Law."

Section 2. (2) Commissioner finds that U. S. Secretary of State has certified concerning exemptions allowed by a foreign State by employees of the U. S. government.

Section 2. (b) K. Services covered by an arrangement between the Commissioner and the agency of another State or Federal Compensation Law.

Section 2. 7. (m) (2) Time of registration fixed "except as the Commissioner may, by regulation otherwise prescribe."

Section 3. (d) The Commissioner shall compute wage credits, etc.

Section 3. (e) Notwithstanding any other provisions of this Act the "Commissioner" may by regulation prescribe what the existence of unemployment eligibility for benefits and the amount of benefits payable shall be determined, etc.

(Aside from the matter presently under discussion it will be noted that said paragraph purports to delegate to the alleged Commissioner legislative power by regulation to repeal or nullify legislation, which power is a

purely legislative function, which of course in itself renders said paragraph 3 (e) void.)

Section 3. (g) (1) Gives the alleged Commissioner authority to make determinations concerning seasonal employment and benefit rights.

Section 3. (g) (2) Commissioner to determine employment that continues substantially all of the year.

Section 3. (g) (3) Normal season of employment to be determined by the Commissioner.

Section 3. (g) (4) Commissioner to prescribe fair and reasonable rules, etc.

Section 4. Pertains to findings by the Commissioner.

Section 4. (a) Pertains to regulations prescribed by Commissioner.

Section 4. (b) Pertains to regulations prescribed by Commissioner.

Section 5 (a) Left work voluntarily if so found by the Commissioner.

Section 5. (b) Discharged for misconduct, as found by the Commissioner.

Section 5. (c) If the Commissioner finds that he has failed without good cause, etc.

Section 6. (b) Claims for benefits shall be made in accordance with such regulations as the Commissioner shall prescribe."

Section 6. (c) (2) Certain things shall be done "if so directed by the Commissioner."

Section 6. (c) (3) The Commissioner shall consider a determination only, etc.

Section 6. (c) (4) Commissioner may dispense with giving notice.

Section 6. (d) (1) The Commissioner shall provide the Board of Review, etc.

Section 6. (d) (2) Commissioner to be given notice of appeal.

Section 6. (d) (7) Commissioner may obtain a judicial review and shall be deemed a party to the proceedings. Upon filing petition for review Commissioner shall send notice to each party.

Section 6. (8) Commissioner entitled to notice.

Section 6. (e) Petition for judicial review by Commissioner.

Section 6. (f) Party receiving money by reason of fraud shall be liable to repay, in discretion of "Commissioner."

Section 6. (8) The Commissioner shall be a party entitled to notice in any proceeding, etc.

Section 6. (e) Filing petition by Commissioner for review shall not authorize Board to direct the denial of benefits.

Section 7. (a) (1) Contributions shall be payable to Commissioner.

Section 7. (e) (1) Commissioner to maintain separate account for each employer.

Section 7. (c) (2) Commissioner to establish regulations concerning joint accounts.

Section 7. (3) Commissioner to classify employers.

Section 7. (e) Commissioner to transfer retiring employers account to successor.

Section 9. (a) Unemployment Compensation Fund administered by Commissioner.

Section 9. (b) Commissioner to designate a treasurer, etc.

Section 9. (c) Commissioner to requisition funds from time to time from unemployment trust fund and in discretion of Commissioner to be redeposited in U. S. Treasury.

Section 9. (D) When unemployment trust fund of U. S. ceases to exist, Commissioner to administer the fund and may invest the funds.

Section 10. There is created in Department of Labor the Unemployment Security Division to be administered by a full time Director subject to the supervision and direction of the Commissioner who shall appoint the Director and fix his compensation.

Section 11. (a) It shall be the duty of the Commissioner to administer this Act; and he shall have power and authority to adopt, amend, or rescind such

rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations and take such other action as he deems necessary or suitable to that end, etc.

Section 11. (b) (1) General and special rules may be adopted, amended or rescinded by the Commissioner.

Section 11. (2) The Commissioner may make findings of fact and make determinations whether an employing unit constitutes an employer, etc.

Section 11. (c) Commissioner to cause copies of Act to be distributed to the public.

Section 11. (d) Commissioner authorized to appoint, fix the compensation and fix the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of his duties under this Act, etc.

Section 11. (e) Commissioner shall appoint a State Advisory Council, etc.

Section 11. (f) Commissioner shall take steps to prevent unemployment.

Section 11. (g) Each employing unit to keep such accounts as Commissioner shall prescribe.

Section 11. (h) Commissioner and others to have power to administer oaths.

Section 11. (i) Courts to have jurisdiction on application of Commissioner or others to entertain contempt proceedings.

Section 11. (j) No person shall be excused from attending and testifying before the Commissioner, etc.

Section 11. (k) In the administration of the Act the Commissioner shall cooperate to the fullest extent with the Social Security Board created by Congress.

Section 11. (1) Commissioner to prescribe regulations as to how information may be made available, etc.

Section 12. (a) (1) Commissioner to conduct an Arkansas State Employment Service.

Section 12. (2) Moneys received from Act of Congress to be paid into the Employment Security Ad-

ministration Fund and made available to the Commissioner.

Section 13. (a) Employment Security Administration Fund created and made available to the Commissioner.

Section 13. (b) Commissioner to report to Governor amount necessary to replace moneys received from the Social Security Board.

Section 14. (a) If contributions are not paid as prescribed by Commissioner they shall bear interest, etc.

Section 14. (b) In case of employer's default, suit may be brought in name of Commissioner. Commissioner may assess penalties against employers who do not file their reports on time.

Section 14. (d) Commissioner may determine whether payment of contributions or interest was erroneous. Commissioner upon proof being submitted satisfactory to him allow a transfer of contributions.

Section 14. (e) If person is delinquent it is duty of Director to assess the contributions delinquent against the employer and to certify the amount to the Commissioner, etc.

16. (d) Commissioner or his employers makes any disclosure of information in violation of the provisions of Section 11 he shall be fined, etc.

Section 17. (a) Commissioner may be represented by attorney.

Section 18. Commissioner authorized to enter into reciprocal arrangements.

Section 18. (e) Commissioner authorized to make investigations to facilitate administration of unemployment law.

Section 18. (d) Commissioner authorized to enter into arrangements whereby facilities of the Act may be utilized in making claims for benefits.

That if the court will read the fragments of the alleged Act remaining after eliminating therefrom the portions thereof with the "Commissioner" inseparably connected therewith you will readily note that there is not enough remaining to constitute even a remote approach to a workable law. It follows that these remain-

ing fragments, even if severable from the alleged Labor Department Act, which they are not, because by unequivocal language grafted on to that Act and made a part and parcel of it, are a nullity.

26. Petitioners further show into the court that the decision of the Arkansas Supreme Court also the judgment of the Arkansas Supreme Court based thereon are arbitrary, evasive, unjust and in violation of the XIV amendment to the Federal Constitution in that they do not constitute the deliberate judgment or judicial determination of the court and hence are not due process of law.

27. That said judgment is in violation and defiance of articles IV, V, VI and VII of the Arkansas Constitution; also; Sections 5 and 6 of Article XVI of said constitution; also Section 4 of Article XVI of said constitution; That the judgment of said court does not constitute due process of law and does not afford to petitioners the equal protection of the law in violation of the XIV amendment to the Federal Constitution.

28. That the foregoing allegations in the two last paragraphs contained are abundantly supported and established by the opinion of said Arkansas Supreme Court in the particulars now following:

(1) Said court in its opinion says: (Record 16) "This Act 391 extends from page 1089 to page 1154, both inclusive of the acts of 1941, which shows that said court must be familiar with said act;

(2.) That again said court in its opinion says: (Record 19) "It is argued that in as much as the Act creates a Department of Labor which is placed under the supervision of an officer designated as, the Commissioner of Labor, who is charged with the enforcement of the provisions of the Act, that it is violative of the following provisions of our constitution, to-wit: Section 1, Article IV; Section 1, Article V; Section 1, Article VI; Article VII and Section 9 of Article XIX.

That in truth and in fact petitioners did not so argue in said Arkansas Supreme Court, primarily because said Act 391 does not create or attempt to create a Department of Labor.

(3.) That said Department of Labor is the subject matter of Act 161 of 1937 as appears from Section 8498 Pope's Digest.

That petitioners did argue in said Arkansas Supreme Court that said Act 161 of 1937 (the Labor Department Act) did violate the constitutional provisions referred to in the opinion of said Arkansas Supreme Court, except section 9 of Article XIX, as appears from petitioners brief filed in said supreme court of Arkansas, at pages 20 to 57 inclusive.

(4.) That said Supreme Court of Arkansas did not, in its opinion pass upon the constitutionality of said act 161 which attempted to create a Department of Labor; that in a petition for rehearing which was filed by petitioners in said Arkansas Supreme Court the attention of said court was called to the fact that no ruling was made on the constitutionality of said act 161, (Record 25) but said Arkansas Supreme Court refused to rule upon said question, as appears from its opinion and its order denying a hearing. (Record 26)

(5) That at the same page of the petition for rehearing the courts attention was called to the fact that Act 391 of 1941 does not create a Department of Labor, but said court did not modify its opinion.

(6.) That the language of the Arkansas Supreme Court recites that petitioners argued that said Act 391 violates Section 9 of Article XIX but that no such argument concerning Act 391 was made by petitioners at any time or in any way as will more fully appear from a copy of petitioners brief which petitioners now present herewith and now ask leave to file in this court, in support hereof.

(7.) That in speaking on the subject matter of Act 391 the Supreme Court of Arkansas in its opinion says: (Record 16) "all of the states have passed legislation on the subject, and it is said also that the constitutionality of such legislation has been uniformly upheld by both the state and Federal Courts at least as against such attacks as are made upon Act 391."

(a) That the fact is that no case in connection with such an Act as 391, or 161 involving such constitu-

tional provisions as Articles IV, V, VI, and VII or any or either of them, have ever been decided in any court of appellate jurisdiction except it be *Stanley vs Gates* 179 Ark. 886-897,8 and *State vs. Martin* 60 Ark. 343 which tend in a large measure to sustain petitioners contentions.

(b) That in so far as the research of counsel for petitioners develops no court of appellate jurisdiction has ever decided whether an act is void and unconstitutional in case such act is grafted onto another and the act engrafted is in large part so depend upon the other that it is uncertain, indefinite and incomplete without it and such other act is unconstitutional and void.

(c) That no court of appellate jurisdiction has ever decided whether an act denies to an employer the equal protection of the law in violation of the XIV amendment to the Federal Constitution where such act provides that no disqualification for benefits shall be made upon the employers evidence unless he notifies the commissioner of such fact, in writing, within three days after the separation of the individual from his employment but leaves the employer free to testify on the subject regardless of notice, as is provided by Section 5 (a) of Act 391.

(d) That no court of appellate jurisdiction has ever held to be constitutional and due process of law or to afford equal protection of the law a provision such as Section 6 (5) of Act 391 to the effect that a determination shall be conclusive as to an employer but not as to an employee or that a determination shall not be subject to collateral attack by an employer, but may be subject to attack by an employee.

(e) That no court of appellate jurisdiction has ever held to be constitutional as against a provision such as sections 1 and 2 of Article IV of the Arkansas Constitution a provision such as Section 8 (b) and (c) of Act 391 attempting to confer power upon the commissioner without limitation to relieve an employer from the provisions of act or bringing an employer within the provisions of the act.

(f) That no court of appellate jurisdiction has ever held to be constitutional as against such a constitu-

tional provision as Section 4 of Article XVI such a law as Section 11 (a) of Act 391.

There are however cases holding that the constitutional requirement for an appropriation is satisfied by provisions concerning payments found in unemployment acts but those cases can have no application in the case here presented by reason of Section 29 and 30 of Article V and Section 2 of Article XVI, the first of which prohibits an appropriation covering a longer period than two years. The act here involved was passed in 1941 and its effect as an appropriation has long ago spent its force. Furthermore the act cannot serve the purpose of an appropriation because by Section 10 the Commissioner is to appoint the Director and fix his compensation and by Section 11 the Commissioner is authorized to employ such persons as he deems necessary or suitable to that end. It is thus made to appear that at no time and in no way does the legislature the constitutional appropriating authority have a voice in the amount of the expenditures above mentioned.

That had said court known of any cases that were at all decisive it is quite probable that said court would have cited them as it did in its opinion in the Buckstaff case 198 Ark. 91.

(g) That no court of appellate jurisdiction has ever decided whether a provision like (5 (a)) of Act 391 violates the equal protection clause of the XIV amendment to the Federal Constitution;

(h) That no court of appellate jurisdiction has ever decided whether a provision like 6 (d) (2) of Act 391 violates the due process clause of the XIV amendment to the Federal Constitution;

(i) That no court of appellate jurisdiction has ever decided whether a provision like (6) (5) of Act 391 violates the equal protection or due process clause of the XIV amendment to the Federal Constitution.

That said Supreme Court has declined to decide questions presented to it for decision and has decided questions not presented to it for decision and in so far as it can be said to have decided any questions presented to it, its decisions are contrary to its own prior decisions of which it has taken no note in its opinion

and are also contrary to the principles of decisions of this court.

(29) Section 5 (a) of Act 391 denies to petitioners the equal protection of the law, in that it denies to employers the right to offer evidence on the subject of disqualification for benefits under circumstances under which it gives to employees the right to testify on the subject, all in violation of the XIV amendment to the Federal Constitution.

(30) Section 6 (5) of Act 391 denies to petitioners the equal protection of the law in violation of the XIV amendment, in that it permits a determination to be conclusive as to an employer and does not permit it to be conclusive under the same circumstances as to the employee.

(31) Section 8 (b) and (c) of Act 391 attempts to confer upon the "Commissioner" power to determine when an employer may cease to be subject to the act or when he may become subject to the act thereby conferring upon the "Commissioner" legislative functions in violation of Article IV of the Arkansas Constitution.

(32) That Section 5 (d) (2) of said Act 391 denies to petitioners and other employers the equal protection in violation of the XIV amendment of the Federal Constitution in that it permits an employee to refuse to work if the conditions of employment not desired by a majority of the employees in the establishment. Said provision last aforesaid does not constitute due process of law in violation of said XIV amendment.

(33) Section 6 (5) of said Act 391 denies to petitioners and other employers the equal protection of the law in violation of the XIV to the Federal Constitution, in that it makes a decision final as to them but does not make it final as to employees.

(34) That after referring to the provisions of Articles IV, V, VI, VII and Section 9 of Article XIX of the Arkansas Constitution, the court in its opinion says: (Record 19) "We will consider these objections to Act 391 collectively" (Record 20).

(35) That said court in its opinion says: "In our opinion Act 391 does not offend against any of these provisions. It does create an administrative agency,

charged with the duty of enforcing its provisions, but it does nothing more and we do not find in the provisions of the constitution above referred to or elsewhere in the constitution any inhibition against the employment of such an agency for such a purpose." That the powers attempted to be conferred upon the Commissioner are not ministerial but are executive and call for the exercise of judgment and discretion.

(36) That petitioners did not in their brief in said court contend and do not now contend, that said Act 391 did violate the constitutional provisions last aforesaid but did contend that the Labor Department Act (Act 161 of 1937) did offend against Articles IV, V, VI and VII but did not contend that it offends against Section 9 of Article XIX and did contend that Act 391 did offend against various other constitutional provisions as to which said opinion makes no rulings.

(37) That said opinion then devotes about four pages to a discussion of said Section 9 of Article XIX which is not involved in the case.

(38) Said Court in its opinion says: "It was said in the Buckstaff case supra that this legislation was enacted pursuant to the police power of the state. Having this power, the General Assembly has the right to create such offices and agencies as are necessary to its exercise."

(39) That said court fails to take note of the distinction between offices and agencies on the one hand and departments of state the creation of which is prohibited by the constitution on the other, nor does said court seem to take note of the fact that the possession of police power does not warrant the legislature in violating the constitution.

(40) That Record 23) in its opinion the Arkansas Supreme Court mentions several commissions and ministerial agencies also what the court refers to as departments but which are probably only offices, except perhaps the Banking Department as will be disclosed by a careful examination of the several acts, then as a sort of apology for its refusal to pass upon the constitutionality of the "Labor Department Act" (Act 161 of 1937) and declare it unconstitutional and void the

court says: "It would be revolutionary to declare these departments and agencies unconstitutional and would not be done if any doubt existed as to their constitutionality"; That petitioners do not contend that the legislature may not, without violating the constitution, create purely ministerial agencies and commissions to carry into office a statutory enactment but the "Labor Department Act confers upon the head of the department powers that are essentially executive and discretionary as distinguished from ministerial; that the Department created by the act is clearly an executive one in addition to that created by Articles IV and VI of the constitution.

41. Other defects, in both the Labor Department Act 161 of 1937 and the unemployment Act of 1941 from a constitutional point of view are,

1. Neither require the Commissioner to be elected whereas such requirement is imposed by Articles V, VI and VII of the Arkansas Constitution.

2. Articles VI Section 9 places the seal of state in the Governor's custody. Section 11 of the unemployment Act, 391 of 1941 places a seal in the custody of the Commissioner and requires that it be judicially noticed. Where does the legislature get the power to tell the Judicial Department what it shall do in view of Section 2 of Article IV?

Wherefore petitioners pray the court that a writ of certiorari issue out of this court directed to the Supreme Court of Arkansas;

That a hearing be had in this court upon the merits of the errors alleged in the petition filed herein:

That this court reverse the judgments of the Arkansas Supreme Court and the trial court;

That in order that constitutional government may endure in the state of Arkansas, this court remand this cause to the trial court with directions to it to enter a decree in accordance with the prayer of the complaint herein, declaring Act 161 of 1937 and Act 391 of 1941 unconstitutional and void and restraining the collection of the so called contributions referred to in Act 391 and decreeing that the monies paid by the

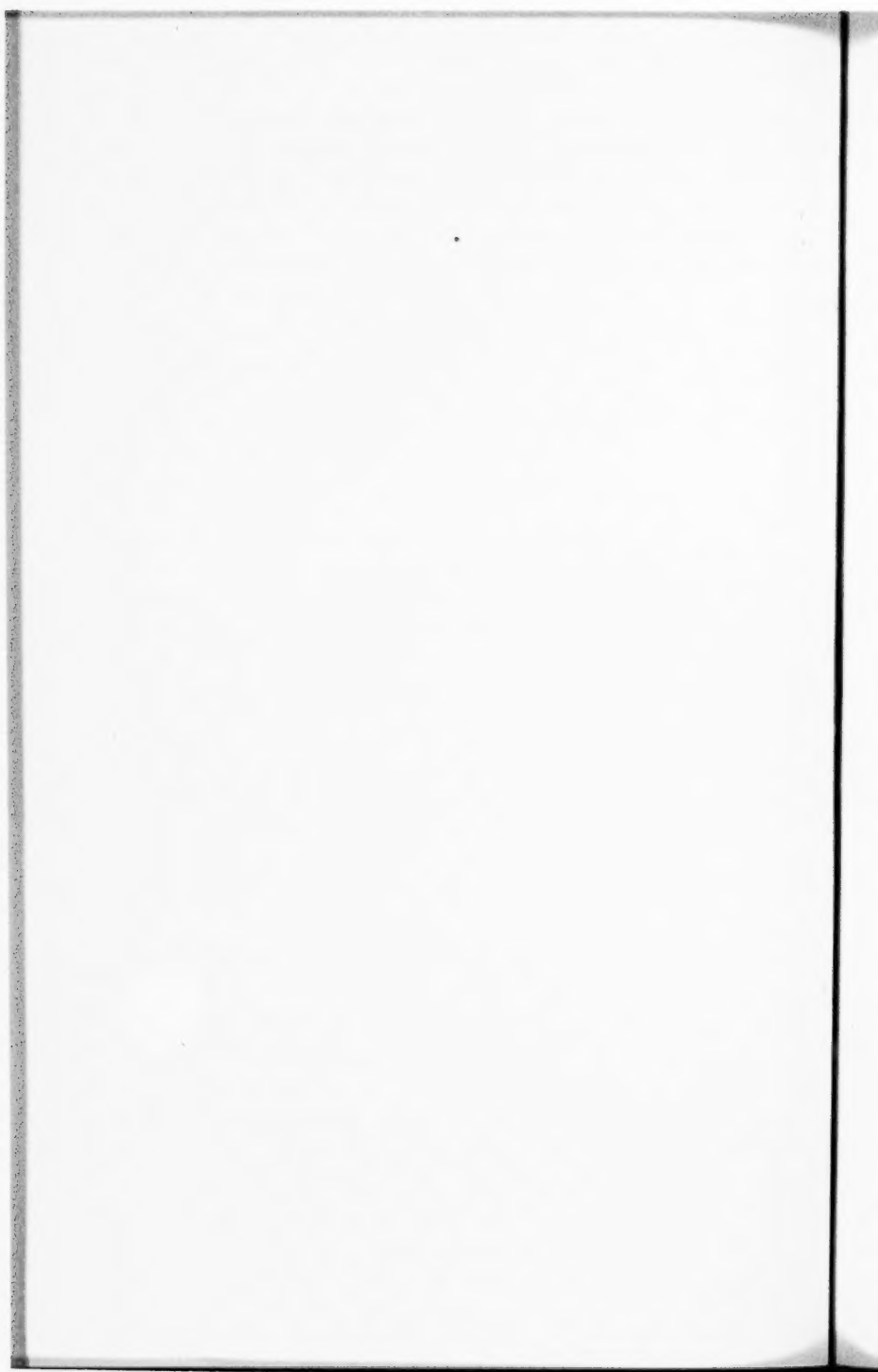
plaintiffs under said act be repaid to them, at least to the extent that any of said monies have not been expended, and that such other and further order be entered herein as to the court may seem meet and just.

Aubrey Hickenbottom, Clarence N. Hudson, Earl E. Bonsteel, F. L. Coffman, Herbert L. Gipson,

Petitioners,

By CHARLES M. HAFT,

Their Attorney



SUBJECT INDEX

(a) The Labor Department Act (Act 161 of 1937) violates Articles IV, V, VI and VII of the Arkansas Constitution and is void.	1
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The unemployment Act is by Section 10 thereof grafted onto the Labor Department Act and that act being unconstitutional and void leaves the unemployment act without any other existence and void.	17
So many acts are required to be done by the Commissioner of Labor in the enforcement of the unemployment act that without him said act is meaningless, useless, uncertain, indefinite, unworkable, unconstitutional and void because the Commissioner of Labor has no existence save by the terms of the void Labor Department Act.	17
The opinion of the Supreme Court of Arkansas is so evasive and arbitrary and decides so many questions not before it for decision and evades deciding so many questions before it for decision that it is not a judicial determination and does not constitute that due process of law required by the XIV amendment to the Federal Constitution, thereby invoking the jurisdiction of this court to pass judicially upon the questions presented by the record, in order to preserve the constitutional rights of a multitude of taxpayers, denied to them by the action of the Supreme Court of Arkansas.	13
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(b) There is no official report, as yet of the opinion here involved, but it is reported in *Hickenbottom vs. McCain* 181 S. W. 2nd 226 (advance sheets No. 2).

(c) The jurisdiction of this court is invoked because violations of the Federal Constitution are involved and the opinion of the State Supreme Court, followed by judgment thereon is not a judicial determination of petitioners rights but is so arbitrary and evasive as not to constitute due process of law but conversely denies to petitioners the equal protection of the law all contrary to the Federal Constitution.

(d) A statement of the case would mean a restatement of the allegations contained in the complaint (Record 1-10) and a restatement of the allegations of the petition herein (ante). Briefly summarized however—

The General Assembly in 1941 passed Act 391 by Section 10 of which a Division in the Department of Labor purports to be created.

This act in and by itself violates the XIV Amendment to the Federal Constitution and various provisions of the State Constitution referred to in the foregoing petition and in this brief.

The Labor Department Act. (Act 161 of 1937) Sections 8498 et. seq Pope's Digest is a clear violation of Articles IV, V, VI and VII of the Arkansas Constitution, and particularly Articles IV and VI in consequence of which it is void and there is not and cannot be a law in Arkansas creating such Department. There can be only three departments by virtue of Article IV and those are created by Articles V, VI and VII of the constitution thereby putting it beyond the power of the legislature to create any department.

It follows that no Employment Security Division in the Department of Labor could be created for the lack of such Labor Department.

Had the Arkansas legislature created a ministerial commission as has been done by most states petitioners principal objection would have been removed.

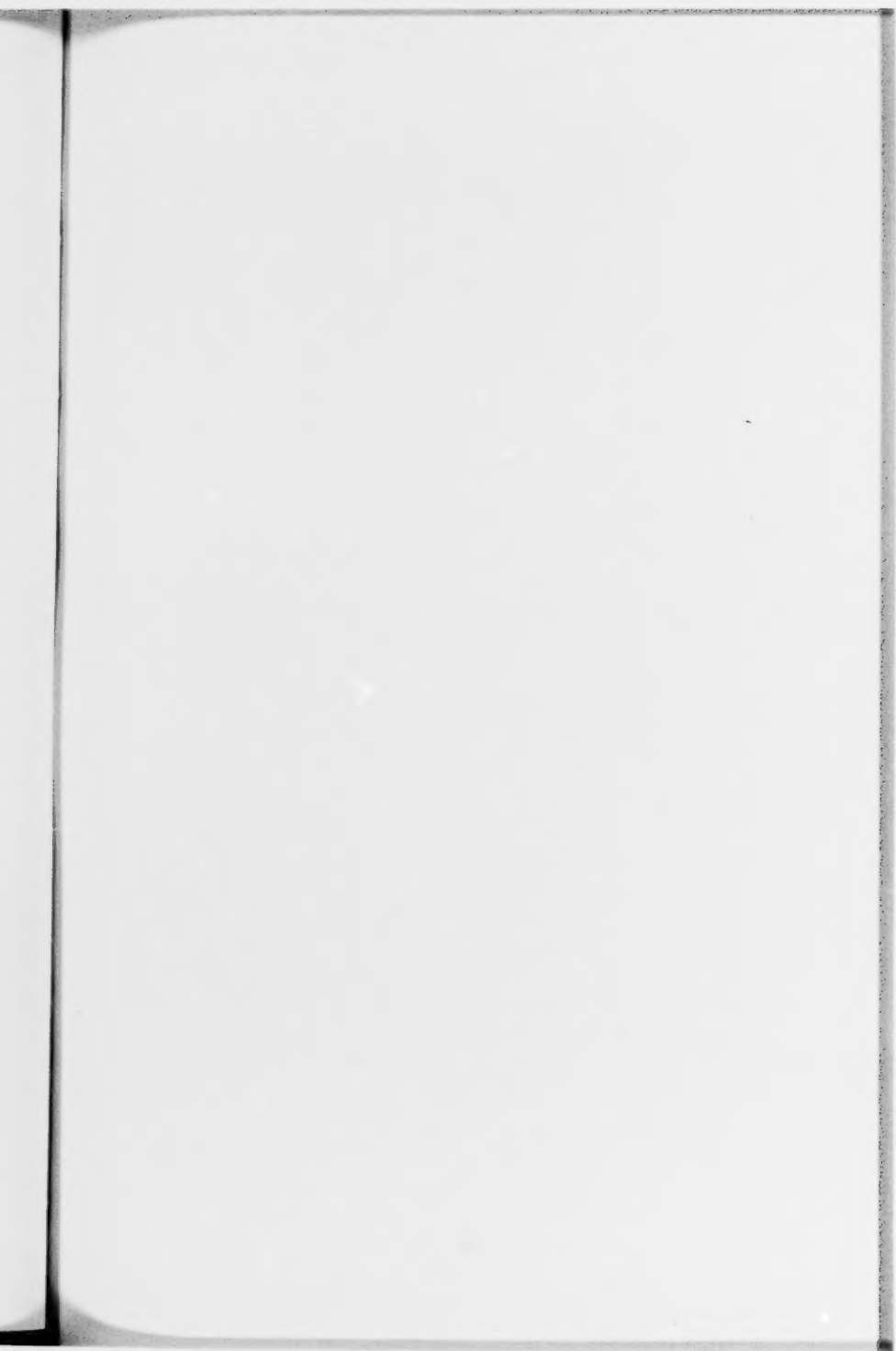
The Constitution of Arkansas has by the above mentioned articles, nullified the action of the legislature in its attempt to create a fourth Department of

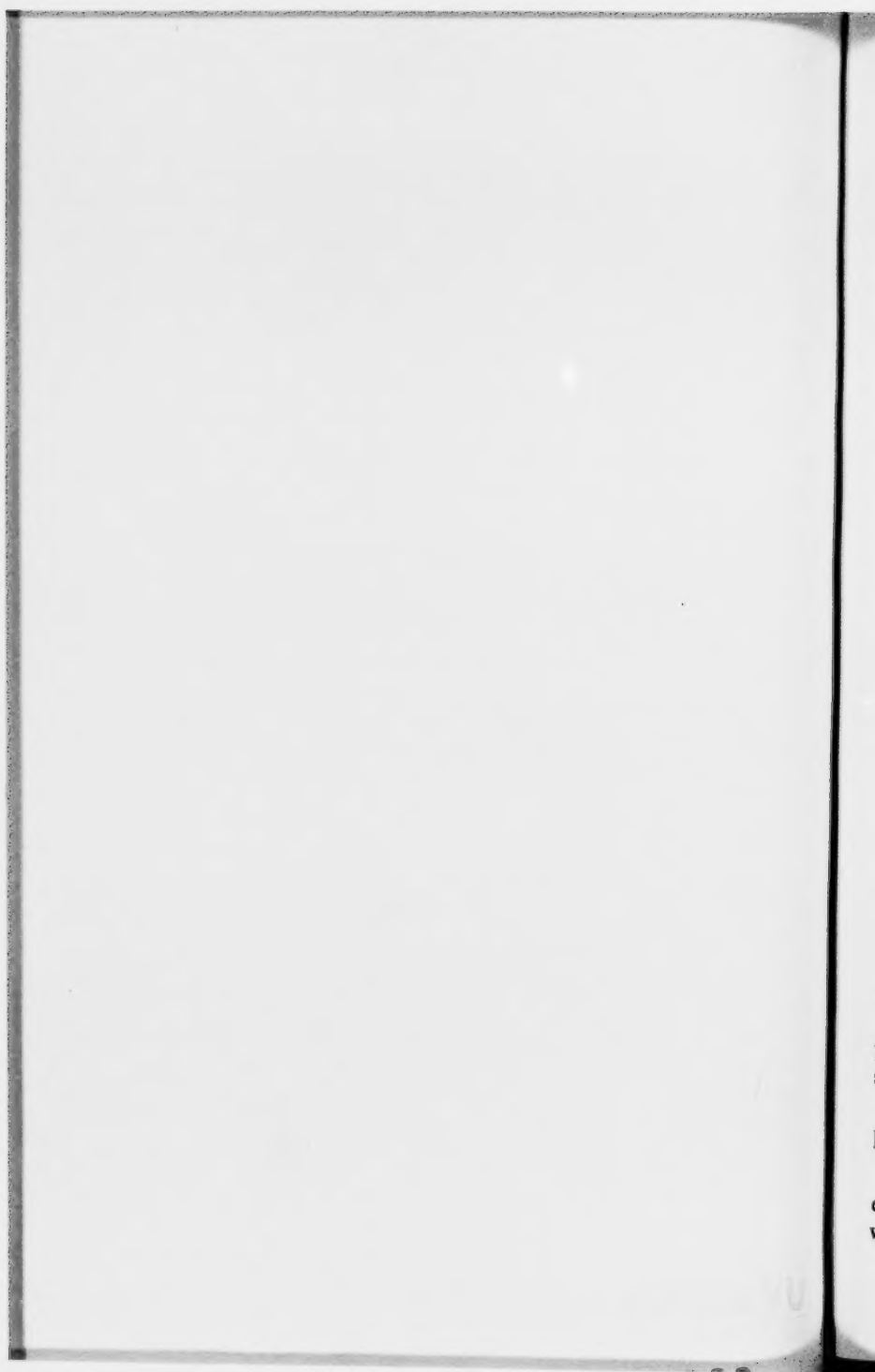
State, in violation of the above mentioned articles of the Arkansas Constitution.

We feel that the above mentioned propositions are unescapable and will impel a reversal at the hands of this court but, Act 391 of 1941 is in itself in violation of the XIV amendment to the Federal Constitution and various provisions of the Arkansas Constitution as shown by the foregoing (a) Subject Index.

(e) Petitioners propose to argue each and all of the errors referred to in (a) supra. If this court should sustain the first of these, it will however amount to a disposition of the entire case.

(f) There are no questions of fact involved in the case so that the foregoing statement will, we hope, give to the court a complete understanding of the issues involved.





IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No.

AUBREY HICKENBOTTOM, CLARENCE N.
HUDSON, EARL E. BONSTEEL, F. L.
COFFMAN and HERBERT L. GIPSON

Petitioners

vs.

W. J. McCAIN, ROLAND M. SHELTON, ROSS
RICHESIN, Sheriff of Boone County, Arkansas;
EULAN MOORE, Clerk of the Circuit Court of Boone
County, Arkansas and HUGH BURLISON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF ARKANSAS

BRIEF IN SUPPORT OF THE FOREGOING
PETITION

MAY IT PLEASE THE COURT:

Inasmuch as the facts are all set forth in the foregoing petition we proceed to discuss the merits of the allegations in said petition contained.

UNCONSTITUTIONALITY OF THE LABOR
BOARD ACT, BEING ACT 161 of 1937.

As the court will have noted the above mentioned act was enacted to supersede a Labor Bureau act theretofore existing which made the Commissioner a ministerial officer;

The new act, if valid, makes him an executive officer.

We submit that the only state executive officer who can exist is one named in Article VI of the constitution. Nevertheless the legislature assumes to confer upon the Commissioner the broadest of executive powers.

By section 10 the Commissioner is empowered to appoint the Director who shall be subject to his supervision and direction, fix his compensation and prescribe his duties.

By section 11 (a) the Commissioner is empowered to adopt amend or rescind such rules and regulations employ such persons, make such expenditures, require such reports, make such investigations and take such other action as he deems necessary or suitable.

The rules and regulations shall be published in such manner as the commissioner shall prescribe. He shall determine his own organization and methods of procedure in accordance with the provisions of the act and shall have an official seal which shall be judicially noticed, amended or rescinded. By Section 11(b) rules may be adopted by the commissioner, after public hearings or opportunity to be heard thereon, on which *proper* notice has been given. Regulations may be adopted, amended or rescinded by the commissioner and shall become effective in the manner and at the time prescribed by the commissioner.

Section 11(d) reads in part, "subject to other provisions of this act the commissioner is authorized to appoint, fix the compensation and prescribe the duties and powers of such officers, accountants, attorneys, experts and other persons as may be necessary in the performance of his duties under this act. The Commissioner may delegate to any such person such power and authority as he deems reasonable and proper for the effective administration of this act, and may in his discretion bond any person handling moneys or signing checks hereunder."

Section 8503(a) Pope's Digest makes it the duty of the Commissioner to enforce all labor laws in the state of Arkansas the enforcement of which is not otherwise specifically provided for. This clearly makes him an executive officer not provided for by the constitution.

The effect of this provision is to make the Commissioner the chief executive of the state, in so far as labor laws are concerned and to that extent takes from the Governor his executive powers, conferred upon him by Section 7 of Article VI of the constitution, to see that the laws are faithfully executed.

We submit that this is a clear violation of section 2 of Article IV of the constitution. This constitutes additional evidence that the Labor Department act is unconstitutional and void.

We submit that it is difficult to conceive of any grants of power that would call for the exercise of more judgment and discretion than is embodied in the language above referred to.

It would seem that the legislature even abdicated some of its own powers in favor of the Commissioner in violation of Section 29 of Article IV and Section 4 of Article XVI of the State Constitution.

Insofar as appears from the opinion herein involved the court writing it was not aware that any question was raised except that Act 391 was in violation of Articles IV, V, VI and VII and Section 9 of Article XIX whereas the fact is that no such questions were raised, but many questions were raised of which fact the opinion takes no note.

At the expense of repetition and to assure precision we again quote Section 1 of Article IV which reads: "The powers of government of the State of Arkansas shall be divided into three distinct departments, each of them to be confined to a separate body of magistracy, to-wit:

Those which are legislative to one, those which are executive to another and those which are judicial to another, and also quote Section 1 of Article VI as follows: "The Executive Department of the State shall consist of a Governor, Secretary of State, Treasurer of State, Auditor of State and Attorney General, * * *, and the General Assembly may provide by law for the establishment of the office of Commissioner of lands."

With this constitutional Rock of Gibraltar, representing as it does an impregnable wall against a fourth department, the General Assembly, in defiance of the Constitution, in 1937 attempted to pass an Act, Section 2 of which reads in part as follows:

"A Department of Labor is hereby created and established under the supervision and direction of a commissioner to be known as the Commissioner of Labor. He shall have charge of the administration and enforcement of all laws, rules, and regulations which it is the duty of the department to administer and enforce, and shall direct all inspections except as otherwise provided." Pope, s Digest, 8498.

It will thus be readily noted that the effect of this Act, if constitutional, is to create an Executive Department. However, as has been noted, an Executive Department had already been created by the Constitution.

It is possible to interdict legislative action creating a fourth department, to participate in the exercise of the State's powers of government, by any one of many expressions. The people in their omnipotence chose to employ for the purpose the words embodied in Article IV. The words so employed are wholly free from ambiguity, and no qualification or limitation can be found.

When the people by Article IV said "the powers of government of the State of Arkansas" they did not mean a part only of those powers; conversely they said and meant all of the powers of government of the State of Arkansas shall be divided into three distinct departments, each (of the three) to be confined to a separate body of magistracy. Those which are legislative to one, those which are executive to another, and those which are judicial to another.

This is accomplished by the Constitution itself. It leaves no powers of government which can by any stretch of the imagination be vested in a fourth department. The supreme law of Arkansas—the Constitution—has utilized each and all of the government's powers in the creation, *by it*, of the three named departments. Now comes one of these three named departments—the General Assembly, defies its creator—the Constitution and attempts to embark upon the department creating business, which however, is the exclusive prerogative of the people of the State of Arkansas, utilizing in so doing, an instrumentality of their own creation—the Constitution of the State which the people alone have the power to amend.

To create a Department of Labor, the people must amend the Constitution. This the General Assembly is powerless to do.

The language of Section 1 of Article IV above referred to is without qualification or limitation and seems so clearly and unequivocally to limit the departments of government in the State to three that neither argument or the citation of authorities would seem to be appropriate. Nevertheless the attention of the court, it seems, should be called to *Robert J. Boud v. Ward*, 85 Federal, where at page 35, the question now under discussion seems to be conclusively determined in the language following:

"It was the privilege and the duty of the chosen representatives of the people who framed this organic law to fix the terms of this mandate and prohibition, and to specify the exceptions to them if there were any. They made no exceptions, and that fact raises the conclusive presumption in the judicial department of government that they intended to make none, and by force of the same Constitution prohibits the court from enacting any, because their province is to interpret, but never to enact or to modify the Constitution or the laws. *Madden v. Lancaster Co.*, 27 U. S. App. 528, 540, 12 C. C. A. 556, 573, 65 Fed. 188, 195; *Morgan v. City of Des Moines*, U. S. App. 593, 8 C. C. A. 569, and 60 Fed. 208; *McIver v. Ragan*, Wheat 25, 29; *Bank v. Dalton*, 9 How. 552, 528; *Vance v. Nance*, 108 U. S. 514, 521, 2 Sup. Ct. 854." (Please see this case in Fed. 390.)

It is entirely possible of course to increase this limit to four, naming the Department of Labor as such fourth department. This necessarily involves a constitutional amendment by the people of the State of Arkansas and not by the Legislature which is a child of the Constitution and not the creator of amendments to it.

Certain it is that there is now no Department of Labor. There may be a genuine necessity in the general public mind for the creation and existence of such a department.

If there is such necessity and the general public desires the establishment of such a department there is only one way to make such department possible. That one way is by means of a constitutional amendment making the departments of government four in number instead of three and making the Department of Labor such fourth department.

In no other way can we have a well organized and enduring State government, supported by the people, directed by the people, and respected by the people.

The Constitution is the only direct mouthpiece, through which the general public can speak.

This matter is rendered still more certain by Section 1 of Article VI which reads: "The Executive Department of this State shall consist of a Governor, Secretary of State, Treasurer of State, Auditor of State, and Attorney General, all of whom shall keep their offices in person at the seat of government and hold their offices for the term of two years until their succes-

sors are elected and qualified, and the General Assembly may provide by law for the establishment of the office of Commissioner of State Lands." And again by Section 2 of the schedule which permits its repeal or amendment by the General Assembly.

While we have an enumeration of all of the officers in the Executive Department we observe that a Commissioner of Labor is not mentioned nor is he mentioned in any other part of the Constitution. It follows that a Commissioner of Labor is not permissible, as the Constitution now stands.

As evidence that the Constitution is the sole source from which the establishment of State offices and officers may take place, we find an exception in the language of Article VI, "and the General Assembly may provide by law for the establishment of the office of Commissioner of State Lands."

By granting to the General Assembly authority to provide by law for this one office, it, in effect, denies to the General Assembly authority to establish any other State office or officer.

The expression of one thing excludes all others.

Watkins v. Wassell, 20 Ark. 410.

Little Rock v. Clifton, 38 Ark. 205.

When at a later date it was found desirable to create a new State office the Legislature was without authority in the premises and it became necessary to amend the Constitution to provide the office of Lieutenant Governor.

VI Amendment to Constitution. This same necessity exists when it comes to providing for a department of Labor, and, the creation of the office of Commissioner in that department.

In discussing a somewhat similar matter the court in *State v. Martin*, 60 Ark. 343, at page 350, said:

"The idea of two Governors, Secretaries of State, Treasurers, etc., is unknown in the history of the formation of State governments in this republic."

By the same token we say that the idea of two executive departments in the formation of the government in the State of Arkansas or any other State of the Union, is unknown in the history of State government.

If the General Assembly can create one department in addition to the three provided for and created by the Constitution, it may create forty departments in addition to those permitted by the Constitution and thereby nullify Articles IV, V, VI and VII of the Constitution.

There must be a limit somewhere and that limit is fixed at three by the people of the State, speaking through their only direct mouthpiece, the Constitution.

We submit that it must stay so fixed if constitutional government is to endure.

Labor affairs were well administered by a bureau acting for many years under the Governor. When the bureau was created it was evidently thought that a department was not permissible owing to Articles IV and VI of the Constitution. There has been no change in the Constitution, so far as an additional department is concerned.

In *State v. Martin*, 60 Ark. 343 in speaking of the Constitution the court at page 348 says:

"Its object is to outline the departments of government and apportion its various powers among them." In speaking of the officers of the Executive department provided for by Section 1 of Article VI the court at page 349 says:

"No one would contend that there could be more than one of each of these functionaries. * * * It would be utterly incompatible with the duties of these officers to have a divided department and a head for each. * * * For instance Sec. 2 provides: The supreme executive power of this state shall be vested in a chief *magistrate* who shall be styled, 'the Governor of the State of Arkansas.' * * * There can be but one chief magistrate, one commander in chief. * * * And in speaking of the legislative power the opinion continues: That sovereign power being delegated by the Constitution to a general assembly it cannot create another general assembly and delegate to it the same power." So the Constitution having created an Executive Department and having delegated to it all of the State's governmental powers of an executive nature, including that of executing labor laws and affairs, the General Assembly may not take from the constitutional Executive Department the execution of labor laws and affairs and confer it upon a second Executive Department of its own creation.

This idea is emphasized by Section 7 of Article VI which provides that the Governor, "shall see that the laws are faithfully executed." This means all laws and does not admit of the Governor seeing that all laws except those pertaining to labor are executed and that another executive called a commissioner shall see to the execution of all labor laws as the Unemployment Act provides.